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Pernec Ebiz Sdn Bhd v CCI Technology Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–494–03 OF 2012
ABDUL WAHAB PATAIL, LIM YEE LAN AND ZAWAWI SALLEH JJCA
12 JUNE 2014

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Civil Procedure — Appeal — Court of Appeal — Hearing of appeal — Whether Court of Appeal may freshly appraise evidence led at trial — Whether failure of trial court to set-out evidence, documents, affidavits and submissions it considered justifies appellate intervention — Whether sufficient for trial court to merely set-out its reasons — Whether error warranting appellate intervention shown

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The appellant appealed against the whole of the judgment of the High Court dismissing the appellant's claim against the respondents. In the appeal, the appellant reargued its case. It was submitted that the High Court failed to direct its mind to the probabilities of the case based on the agreed facts and on the undisputed evidence, but was instead perturbed by the impression of messiness, which was compounded by a simplistic approach and selective appraisal of facts. The Court of Appeal was called on to freshly appraise the evidence led at trial.

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Held, dismissing the appeal with costs of RM15,000:

(1) The High Court summed the plaintiff's case as presented by counsel. The Court of Appeal was not shown where, if any, the errors were and the court found no material errors in the reproduction (see para 6).

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(2) The High Court did not set-out the evidence it heard, the documents, affidavits and submissions it read. Nor did it reproduce in the grounds of judgment the submissions on the facts, law and evidence it described as comprehensive. Nor did it set-out how it gave the much consideration to the submissions. The Court of Appeal however agreed that it served no useful purpose. It is not necessary for the court to set it all out to prove that it considered what it heard and read and demonstrate how it considered the submissions. It is sufficient that the court, as did the High Court in this case, set-out its reasons (see para 15).

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(3) The burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities. It must present its case sufficiently clearly to do so. It cannot merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issues and expect the court to make out the case on its own for one party or the other. The

submissions failed to analyse the pleadings, the facts and the evidence as against the issues requiring a decision, and to tabulate the same so that a logical and reasoned decision could be made that satisfied the fundamental requirement of a fair and just decision. Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed (see para 19).

(4) There was no error on the part of the High Court as would warrant appellate intervention without contravening s 72 of the Courts of Judicature Act 1964 (see para 20).

[Bahasa Malaysia summary

Perayu merayu terhadap keseluruhan penghakiman Mahkamah Tinggi dalam menolak tuntutan perayu terhadap responden-responden. Dalam rayuan, perayu merayu semula kes ini. Ia dihujahkan bahawa Mahkamah Tinggi gagal untuk mengarahkan mindanya kepada kemungkinan kes berdasarkan atas fakta yang dipersetujui dan atas keterangan yang tidak dipertikaikan, tetapi sebaliknya risau oleh tanggapan tidak teratur, yang dicapai dengan persetujuan oleh pendekatan mudah dan penilaian fakta terpilih. Rayuan dirayu kepada Mahkamah Rayuan untuk menilai semula keterangan yang dikemukakan semasa perbicaraan.

Diputuskan, menolak rayuan dengan kos sebanyak RM15,000:

(1) Mahkamah Tinggi menyimpulkan kes plaintif seperti yang dikemukakan oleh peguam. Mahkamah Rayuan tidak ditunjukkan di mana, jika ada, kesilapan dan mahkamah mendapati tidak ada kesilapan material dalam pengemukaan semula (lihat perenggan 6).

(2) Mahkamah Tinggi tidak menerangkan keterangan yang ia dengar, dokumen, afidavit dan hujahan yang dibacanya. Juga tidak mendedahkan semula dalam alasan penghakiman hujahan atas fakta, undang-undang dan keterangan yang ia berikan sebagai menyeluruh. Juga ia tidak menyatakan bagaimana ia memberi pertimbangan kepada hujahan. Mahkamah Rayuan walau bagaimanapun bersetuju bahawa ia tidak bermakna. Adalah tidak perlu untuk mahkamah mengemukakan ke semuanya untuk membuktikan yang ia mempertimbangkan apa yang ia dengar dan baca dan mendemonstrasikan bagaimana ia mempertimbangkan hujahan tersebut. Adalah mencukupi bahawa mahkamah, seperti yang dibuat oleh Mahkamah Tinggi dalam kes ini, menyatakan alasannya (lihat perenggan 15).

(3) Beban ke atas plaintif dalam tindakan sivil hanya untuk membuktikan kesnya atas imbangan kebarangkalian. Ia mesti mengemukakan kesnya dengan mencukupi dan dengan jelas berbuat demikian. Ia tidak dapat dengan hanya memfailkan pliding, memfailkan ikatan dokumen, meneruskan kepada perbicaraan, memanggil saksi untuk memberi

keterangan dan berhujah atas pelbagai isu dan menjangkakan mahkamah untuk memutuskan kes dengan sendiri untuk satu pihak atau pihak satu lagi. Hujahan gagal untuk menganalisa pliding, fakta dan keterangan sebagai menentang isu-isu yang memerlukan keputusan, dan untuk menyusunnya supaya keputusan munasabah dan logik boleh dibuat yang memenuhi keperluan asas keputusan adil dan saksama. Di mana pihak diletakkan dengan beban untuk membuktikan kesnya gagal berbuat sedemikian, ia gagal untuk membuktikan kesnya dan tindakannya mesti ditolak (lihat perenggan 19).

(4) Tidak terdapat kesilapan oleh pihak Mahkamah Tinggi untuk mewajarkan campur tangan mahkamah rayuan tanpa melanggar s 72 Akta Mahkamah Kehakiman 1964 (lihat perenggan 20).]

Legislation referred to

Contracts Act 1950 s 38(1)
Courts of Judicature Act 1964 s 72

Appeal from: Civil Suit No D1–21-2021 of 2008 (High Court, Kuala Lumpur)

Sulaiman bin Abdullah (Mohdamed Zaini Mazlan, Abu Daud Abd Rahim & Ahmad Syiimir Suffian with him) (Azmi & Assoc) for the appellant.
Charanjit Singh Saini (CS Saini & Assoc) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Pernec Ebiz Sdn Bhd appealed against the whole of the judgment dated 27 January 2012 of the High Court dismissing the appellant's claim against the respondents.

[2] In the appeal before us, the appellant reargued its case. The submission was delivered with marked fluency, assertively impressing upon the court that even if the oral evidence for the appellant were rejected, there was contemporaneous documentary evidence as well as evidence of conduct of the parties, in particular the conduct of the defendants. It was submitted that the High Court failed to direct its mind to the probabilities of the case based on the agreed facts and on the undisputed evidence, but was instead perturbed by the impression of messiness, which was compounded by a simplistic approach and selective appraisal of facts. This court is called on to freshly appraise the evidence led at trial.

[3] The written submission continued at para 48 that had the High Court weighed and assessed the evidence leading to the conclusions set-out below from para 47 of the written submissions, it would have been able to deliberate

on the issues as submitted by the parties:

47. The Appellant submits that the learned High Court Judge had failed to weigh the uncontested evidence that form the following analysis:

47.1 that 3,705 payphones had been delivered to the 1st Respondent;

47.2 the Parties had mutually agreed to amend the Contract to allow the 1st Respondent to procure booth directly from supplier;

47.3 that the 1st Respondent had agreed to the amendment and had subsequently acted in accordance with the amendment;

47.4 admitting its part of the bargain, the Appellant had also allowed the 1st Respondent to pay its monthly instalment based on an altered position, calculations were based on number of installed payphones instead of number of supplied payphones provided in the Contract;

47.5 payments were made by the 1st Respondent accordingly;

47.6 that the 1st Respondent did not make any payment towards monthly instalment after January 2008;

47.7 the Respondents failed to adduce any evidence or call any witness to prove that the Appellant, or its staff, sabotaged the PRMS (Payphone Remote Management System), a computerized system used to monitor the payphones operation remotely;

47.8 by not making payments the 1st Respondent had breached a condition of the Contract and its only obligation in consideration for the supply of payphones;

47.9 the 1st Respondent did not pay the full price of the payphones remaining in its possession;

47.10 that at all times, the 1st Respondent enjoyed the benefits derived from the unpaid payphones;

47.11 that the Appellant had terminated the Contract after the 1st Respondent defaulted on more than three instalments; and

47.12 that the 1st Respondent accepted the Termination and the 1st Respondent had acted consistently with the Termination.

[4] The submission was summed at para 51 as follows:

51. Considering the apparent possibility of such, the Appellant submits that this Honorable (sic) Court of Appeal is called on to freshly appraise the evidence led at trial.

[5] Before proceeding as suggested to freshly appraise the evidence led at trial, we examined 'the apparent possibility of such'. We do so by examining the grounds of judgment. We make the following observations:

(a) after setting out the four orders sought against the first defendant, the seven orders against the fifth defendant, the ten orders against the second, third and fourth defendants, the six orders against the sixth defendant, the four orders against the seventh defendant and the 23 orders against the defendants and where applicable, their officers or employees or trustees or agents, the High Court noted that whatever relief the plaintiff had stated in the statement of claim was not led in evidence to justify the claim. This court was not indulged with submissions as to where the High Court erred in the observation it noted;

(b) at para 4, the High Court noted the facts it took into consideration in order to appreciate the case in the right perspective; and

(c) the High Court then proceeded to consider the case in the light of the jurisprudence that no one can gain an advantage by his own wrong. The paragraphs that followed noted that:

(i) despite various case managements, the plaintiff's case was not satisfactorily sorted out and the pleadings and the evidence of witnesses were not consistent;

(ii) it also had to intervene during trial dates to case manage the plaintiff's case and even so the plaintiff did not satisfactorily act to enable the court to adjudicate the issues in the right perspective; and

(iii) it is not a filter of debris.

[6] Notwithstanding those observations, the High Court summed the plaintiff's case as presented by counsel. In its grounds of judgment, the High Court reproduced that plaintiff's summary from encl 81, the first to fourth defendants' summary from encl 99, the fifth to seventh defendants' summary from encls 87 and 97, the agreed facts from encl 80 and the 26 issues to be tried from encl 73. We were not shown where, if any, the errors were and we found no material errors in the reproduction.

[7] 20 pages into its grounds of judgment, beginning at para 16, the High Court stated:

> The plaintiff's evidence had material contradictions, and was not consistent with contemporaneous documents, and pleadings and lacked credibility and truth. The main witness for the plaintiff, PW1, was not consistent and his credibility was discredited during cross-examination. ...

[8] Though there appears to be a dearth of explanation for these statements, giving the impression these were bare statements, it is mitigated by the following from the same paragraph:

> ... The parties have annexed a critical appraisal of the oral evidence and it is marked as encls 98, 100 and 102. In addition, the parties have dealt with it in detail in their submissions. Learned counsel for the plaintiff had conceded that the termination of the contract was not in compliance with the agreement. Paragraph 134 of the plaintiff's submission after trial in encl 96 reads as follows:
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> > 134. Plaintiff conceded that the termination of the Contract by way of letter dated 17.4.2008 was not in strict compliance with the termination terms in the Contract.

[9] Proceeding to those documents, we find no reason to hold that the High Court erred in the statements it made and reproduced at para [7] above. The concise statements may not afford the ease and convenience of a speaking judgment, but no court had, at the time, the luxury of time to write lengthy judgments.

[10] The High Court then took into consideration the arbitration clause as well as the entire contract clauses to hold:

(a) the termination letter dated 17 April 2008 in encl 83A, pp 166–167 stating that: 'we are terminating the said contract with immediate effect' was in breach of cl 8 of the said agreement;

(b) the suit through the court process is an abuse of the arbitration clause at cl 23; and

(c) the plaintiff's allegation that cl 2.2.2(d) of the agreement was amended and consented to by the first defendant is not supported by the evidence of the agreed entire contract term in cl 15 and that no modification, addition or waiver of the terms and condition of the contract shall be effective unless in writing and signed by an authorised representative of both parties.

[11] At paras 19–20 of the grounds of judgment, the High Court commented that:

(a) the wide issues to be tried as agreed by parties was messy, overlapping;

(b) they ought to have been dealt with in a more concise manner for the court to deal with the real issues and controversies taking into consideration the withdrawal of the first to fourth defendants' counterclaim and the final submission of the plaintiff; and

(c) it was a fatal error for the plaintiff for failing to focus their case according to the pleadings and massive prayers but went on in their submission to seek for relief without any application for amendment in the right perspective.

[12] In this, the High Court did no more than to give a reminder that the burden is at all times upon the plaintiff to prove its case upon a balance of probabilities. It is trite that in that, in respect of litigation for justice, a fair and just decision is founded upon a foundation of facts not disputed, facts agreed, and findings of fact from based upon evidence that are (a) put before the court, and (b) safe to rely upon. Merely adducing 'evidence' by calling witnesses to testify on the day of trial, leaves:

(a) the parties to resort to weak and largely ineffective 'put' questions; and

(b) the trial court to make choices that are easily debated in subsequent appeals.

[13] To ensure that the court can identify what evidence put before it is safe to rely upon as basis for findings on disputed facts, the parties in litigation should use the available processes of discovery and production, and of interrogatories to enable them to have the opportunity to check and verify the evidence relied upon on disputed facts. It transforms the decisions that the courts can deliver from being the inherently unsatisfactory decisions based upon choosing which version to accept, to decisions fit to be termed judicial decisions, that are logically reasoned application of law to facts and evidence that had been checked and verified to be safe to rely upon. We hold that while the litigation process leaves it to the parties to choose what cause of action and facts to rely upon, and thus on the face of it appear to be adversarial, justice itself is not.

[14] At para 22 of the grounds of judgment, the High Court stated:

> I have heard the evidence, read the documents, affidavits and submissions of the parties in detail. Learned counsels for the parties have filed comprehensive submissions on the facts, law and evidence. The court is grateful. It will serve no useful purpose to repeat the same save as to deal with the core issues. After having given much consideration to the submission of learned counsel for the plaintiff, I take the view the plaintiff's action must be dismissed. My reasons, inter alia, are as follows: ...

[15] The High Court did not set-out the evidence it heard, the documents, affidavits and submissions it read. Nor did it reproduce in the grounds of judgment the submissions on the facts, law and evidence it described as comprehensive. Nor did it set-out how it gave the much consideration to the submissions. We agree it serves no useful purpose. We hold it is not necessary

for the court to set it all out to prove that it considered what it heard and read and demonstrate how it considered the submissions. It is sufficient that the court, as did the High Court in this case, set-out its reasons.

[16] The reasons given by the High Court may be summarised as follows:

(a) it was not disputed that the plaintiff's act of terminating the contract was not as per the terms of the agreement;

(b) having breached the contract the plaintiff is:

(i) not entitled to seek an injunction from the court without disclosing the material facts; and

(ii) also not entitled to seek any relief in this court on the factual matrix of the case,

(c) it is not proper for the plaintiff to seek a remedy in court in the first instance when there was a specific provision for arbitration and also appropriate preliminary contractual steps for dispute resolution; and

(d) having failed to fulfil its contractual obligations under the agreement, it was wrongful of the plaintiff to terminate the agreement. In this the High Court relied upon the principle that no one can take advantage of his own wrong doing.

[17] These reasons were founded upon the principle that contracting parties are obliged to uphold the sanctity of contract and honour the bargain they have entered into, as embodied in s 38(1) of the Contracts Act 1950:

> The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.

[18] In our view, the application of s 38(1) means that unless and until the provision in the contract to proceed to arbitration is amended, the parties cannot ignore the provision and proceed to litigate in court as happened in this case.

[19] The submissions before us more than amply demonstrate the difficulty the High Court found. The submissions for the appellant closed with the submission that when the High Court rejected the claim, the respondents ended up benefiting accidentally on phones that they did not return. It was clearly a case where the appellant's case would have been better served had there been less indulgence in and emphasis on legal argument and more effort put to tabulate the numbers and location of the payphones. Even though the burden upon a plaintiff in a civil suit is only to prove its case upon a balance of probabilities, it must present its case sufficiently clearly to do so. It cannot

merely file pleadings, file bundles of documents, proceed to trial, call witnesses to testify and argue on the various issues and expect the court to make out the case on its own for one party or the other. The submissions failed to analyse the pleadings, the facts and the evidence as against the issues requiring a decision, and to tabulate the same so that a logical and reasoned decision can be made that satisfies the fundamental requirement of a fair and just decision. Where the party upon whom the burden of proving its case lies fails to do so, it fails to prove its case and its action must be dismissed.

[20] We find no error on the part of the High Court as would warrant appellate intervention without contravening s 72 of the Courts of Judicature Act 1964 (Act 91). We dismiss the appeal with costs. Costs is fixed at RM15,000. Deposit to account of costs.

Appeal dismissed with costs of RM15,000.

Reported by Kanesh Sundrum